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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1003

COUNTY OF IMPERIAL AND THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

Appeal From United States District Court, Southern District of California.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JAMES H. HARMON, *County Counsel, County of Imperial,*

County of Imperial Courthouse,
El Centro, Calif. 92243,
(714) 352-3610 Ext. 250,

Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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vs.

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Respondents.

Appeal From United States District Court, Southern District of California.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners are the County of Imperial, a political subdivision of the State of California, and the Superior Court of the State of California in and for the County of Imperial. For convenience, said Petitioners are sometimes referred to herein as "County" and "Superior Court", respectively. Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on July 26, 1979.

Opinions Below.

The opinion of the Court of Appeals is reported at 604 F.2d 1174 (9th Cir. 1979) and is attached hereto as Appendix "A". The unreported Order Granting Motion for Preliminary Injunction and Preliminary Injunction of the District Court are set forth in Appendix "B".

Jurisdiction.

The judgment of the Court of Appeals was entered on July 26, 1979. A timely petition for rehearing was denied on October 17, 1979, and this petition for certiorari was filed within 90 days of said date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented.

Where the California Supreme Court held the owner of a water well estopped from challenging a restriction in his use permit prohibiting out-of-county sale of water and bound by the restriction, and where this Court dismissed the well owner's appeal, may third party merchants engaged in purchase of water for export to Mexico invoke the jurisdiction of the Federal Courts to enjoin enforcement of the State Court judgment?

Statutory Provision Involved.

The statutory provision involved in this case is the "Anti-Injunction Act", which is contained at 28 U.S.C. §2283. Said Act provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

Statement of the Case.

In 1967, W. Erle Simpson was issued a use permit by the County authorizing the sale of water from a well on his premises, which was located in a residential subdivision. The permit contained a condition that water from the premises could only be sold for use within the County.

In June, 1972, Donald C. McDougal, hereinafter referred to as "McDougal", purchased the premises and, without obtaining a new permit, commenced selling water which was exported by tank truck to Mexico. The County sought injunctive relief in the Superior Court.

The Superior Court rejected McDougal's contention that the use permit export restriction violated the Commerce Clause of the United States Constitution. After trial, a permanent injunction was granted enjoining McDougal and all persons acting in concert with him from ". . . conducting a trucking operation on the premises similar to that which occurred on or about June 30, 1972".

On appeal, McDougal renewed his challenge to the use permit restriction on grounds it violated the Commerce Clause. However, the State Court of Appeal affirmed the Superior Court judgment and the California Supreme Court granted hearing.

The State Supreme Court partially affirmed the judgment by holding McDougal bound by the export restriction and estopped from challenging its validity. *County of Imperial v. McDougal*, 19 Cal.3d 505, 138 Cal. Rptr. 472, 564 P.2d 14 (1977). A copy of the *McDougal* decision is attached hereto as Appendix "C".

The estoppel against McDougal resulted from facts showing that the out-of-county sale restriction was not

challenged by Mr. Simpson and that his request to export water to Mexico was voluntarily withdrawn from the permit application. (C-6.) Due to the estoppel, the California Supreme Court concluded it was unnecessary to determine whether the export restriction was violative of the Commerce Clause, as urged by McDougal. (C-6.) Petition for rehearing, filed by McDougal, was denied. (C-11.)

McDougal appealed to this Court and also applied for stay and supersedeas. The application was denied on October 17, 1977. *Donald C. McDougal v. County of Imperial,* No. 77-471. The appeal was dismissed for lack of a substantial federal question, on November 14, 1977. (434 U.S. 899, 54 L.Ed.2d 187, 98 S.Ct. 294.)

Respondents Gallego Munoz, Martinez, and de Leon are residents of Mexico who had contracts for purchasing water from McDougal and were exporting water to Mexico. In July, 1977, they filed the instant action in the Federal District Court seeking to enjoin the County, certain of its officers, and the Superior Court from enforcing the use permit export restriction. Respondents alleged the restriction violated the Commerce Clause of the United States Constitution and asserted the State Courts erred in the *McDougal* decision.

In response to Respondents' motion for preliminary injunction, the County urged the District Court to deny relief and to dismiss, on grounds the decision of the California Supreme Court was *res judicata* and that the federal action was further barred by 28 U.S.C. §2283. The District Court, however, issued a preliminary injunction enjoining the County and its officers from enforcing the condition in the use permit held by McDougal.

McDougal thereafter resumed sales of water for export to Mexico. The County unsuccessfully sought a stay and appealed to the Court of Appeals for the Ninth Circuit. During pendency of the federal appeal, the Superior Court found McDougal in contempt of its judgment, but stayed execution of the contempt order.[1]

In affirming the District Court, the Court of Appeals concluded that because the California Supreme Court had not determined whether the County could constitutionally restrict export of water, its decision did not bar Respondents' action. (A-7.) The Ninth Circuit also rejected the County's argument that Respondents' action was barred by the Anti-Injunction Act. (A-5, 6.) Finally, the Court of Appeals directed that the District Court should determine the validity of the export restriction in light of *Hughes v. Oklahoma*, ... U.S. ....., 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979). (A-4.)

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[1]The text of the Superior Court's Contempt Judgment and Order Clarifying Stay of Execution Provisions in Contempt Judgment are attached as Appendix "D". McDougal challenged the contempt holding in the State Court of Appeal and that Court is awaiting action by this Court before ruling (California Court of Appeal, Fourth Appellate District, Case No. 18915).

REASONS FOR GRANTING THE WRIT.

I

The Decision of the Court of Appeals Directly Conflicts With the Holding of the California Supreme Court in the McDougal Case.

The California Supreme Court held McDougal estopped from challenging the export restriction in his use permit and bound by its terms. *County of Imperial v. McDougal* (*supra*). The Court specifically stated:

> ". . . [A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. (citations omitted.) Thus, McDougal is estopped to assert that the prohibition . . . against the sale of water for use outside the county is invalid, and he is bound by the limitation." (C-6.)

The foregoing holding was based on facts adduced at trial establishing that Mr. Simpson, McDougal's predecessor, did not challenge the prohibition against out-of-county water sales. (C-6.) Simpson was represented by counsel and voluntarily withdrew from his application a request to export water to Mexico. (*Id.*)

The State Supreme Court also rejected McDougal's attempts to raise new contentions by petition for rehearing, as follows:

> "McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of

> rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the Court of Appeal or in this court" (citing authorities). (C-11.)

This Court granted the County's motion to dismiss McDougal's appeal. (434 U.S. 899, 54 L.Ed.2d 187, 98 S.Ct. 294 (1977).[2]

Respondents, however, alleged in their federal complaint *inter alia* "[t]he action of [the] County of Imperial, the State Supreme Court of California and the Superior Court . . . is in direct contradiction to and is invalid pursuant to [the Commerce Clause] of the United States Constitution . . ."[3] Based on the Respondents' motion, the District Court enjoined the County and its officers from enforcing the export restriction in McDougal's use permit. (B-12.)

Said injunction issued by the District Court, and affirmed by the Court of Appeals, is in direct conflict with the *McDougal* decision of the California Supreme Court. The State Court decision holds the export restriction in McDougal's use permit is enforceable—the Federal Court order enjoins enforcement of the restriction.

The legal labyrinth created by the aforesaid conflict is manifested by the Superior Court's contempt judg-

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[2]The County's motion was brought under Rule 16(b) of the Rules of this Court and cited authorities stating the Court has consistently refused to grant jurisdiction on appeal from a state court judgment resting on an adequate non-federal ground (*see*, for example, *McCoy v. Shaw*, 277 U.S. 302, 72 L.Ed. 891, 48 S.Ct. 519 (1927) and Stern and Gressman, Supreme Court Practice (5th Ed., 1978), pp. 230-245.)

[3]Respondents' pleadings and other documents are lodged with the Court of Appeals.

ment wherein the Court found ". . . McDougal is knowingly selling water . . . for distribution and use outside the County . . . particularly in Mexico" and ruled "[s]uch sales . . . constitute willful disobedience of the Judgment of th[e] Court . . ." (D-2.) It is a matter of public importance that this Court grant this petition and resolve the jurisdictional conflict.

II

The Court of Appeals Erred in Not Recognizing the Decision of the California Supreme Court as a Bar to Respondents' Action.

A. Enforceability of the Export Restriction Was Fully Adjudicated in the McDougal Case and Said Decision Therefore Constitutes a Final Judgment "on the Merits".

In response to the County's assertion the holding of the California Supreme Court was *res judicata* as to Respondents' action, the Court of Appeals stated "[a] review of the . . . decision reveals that the issue of whether the County can constitutionally restrict the export of water was not reached by the court. (Citation omitted.) There is thus no valid final judgment on the merits existing as to the cause of action in the instant case". (A-7, 8.)

The aforesaid reasoning is fallacious.

Enforceability of the subject export restriction *was* the central issue in the *McDougal* litigation. Throughout the state court proceedings, McDougal attempted to challenge the constitutionality of the restriction. Further, Respondent Gallego Munoz participated as a declarant in the state court proceedings and joined in raising

the Commerce Clause issue as *amicus curiae* before the State Supreme Court.[4]

The California Supreme Court upheld the enforceability of the out-of-county sale restriction in McDougal's use permit based on the theory of estoppel. Estoppel *is* a valid and substantive ground for a state court decision.

In *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318 (1916), this Court refused to disturb a decision of the Nebraska Supreme Court based on estoppel and dealing with the relative rights of parties to divert river water for irrigation. Discussing the Nebraska Supreme Court decision, the Court stated:

> "As has been shown, several questions were presented to the supreme court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the 14th Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a Federal question and the other as plainly non-Federal . . . In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it (citations omitted).
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> * * *

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[4]A copy of the *Amicus Curiae* Brief of Guillermo Gallego Munoz is in the record below.

"It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment." (243 U.S. 157, 163-165.)[5]

Respondents hold no special use permit authorizing commercial water sale operations in the County. Any right they have to purchase water from McDougal's property is necessarily derivative of rights under the latter's use permit.[6]

Respondents' action does *not* challenge an ordinance or County-wide policy prohibiting water export. Instead, it attacks the constitutionality of the condition in Mc-

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[5]Estoppel was found to be an adequate and independent state ground in all of the following cases: *Pierce v. Somerset Railway,* 171 U.S. 641, 43 L.Ed. 316, 19 S.Ct. 64 (1898); *Lowry v. Silver City Gold and Silver Mining Co.,* 179 U.S. 196, 45 L.Ed. 151, 21 S.Ct. 104 (1900); *Utley v. City of St. Petersburg,* 292 U.S. 106, 111-112, 78 L.Ed. 1155, 54 S.Ct. 593 (1933); *Beals v. Cone,* 188 U.S. 184, 196, 47 L.Ed. 435, 23 S.Ct. 275 (1903); *Hale v. Lewis,* 181 U.S. 473, 479-480, 45 L.Ed. 959, 21 S.Ct. 677 (1901); *Gillis v. Stinchfield,* 159 U.S. 658, 40 L.Ed. 295, 16 S.Ct. 131 (1895); *Michigan v. Flint,* 152 U.S. 363, 368, 38 L.Ed. 478, 14 S.Ct. 586 (1894); *Israel v. Arthur,* 152 U.S. 355, 362, 38 L.Ed. 474, 14 S.Ct. 583 (1894); *Sherman v. Grinnell,* 144 U.S. 198, 202, 36 L.Ed. 403, 12 S.Ct. 574 (1892); *Marrow v. Brinkley,* 129 U.S. 178, 181, 32 L.Ed. 654, 9 S.Ct. 267 (1888); *Adams County v. Burlington and Mo. River Railroad Co.,* 112 U.S. 123, 127-129, 28 L.Ed. 678, 5 S.Ct. 77 (1884).

Two additional cases, in which state court decisions based on estoppel, were held to have been decided on adequate state gounds are of particular interest. In *Mobile, Jackson and Kansas City R. Co. v. Mississippi,* 210 U.S. 187, 204, 52 L.Ed. 1016, 28 S.Ct. 650 (1907) and *Rutland Railroad Co. v. Central Vermont Railroad Co.,* 159 U.S. 630, 640, 40 L.Ed. 284, 16 S.Ct. 113 (1895), this Court rejected appeals on said grounds even though interference with interstate commerce was alleged.

[6]The State Supreme Court observed that the terms of a conditional use permit run with the particular land. *County of Imperial v. McDougal* at C-5 citing *Cohn v. Board of Supervisors,* 135 Cal.App.2d 180, 184, 286 P.2d 836 (1955).

Dougal's use permit—a restriction already held enforceable by the California Supreme Court.

Since the State Supreme Court decision upholds the enforceability of the very export restriction challenged by Respondents, the decision must be deemed "on the merits" as to the Respondents' cause of action. In *Hatchitt v. United States,* 158 F.2d 754, 755 (9th Cir. 1949), the Court of Appeals held as follows:

> "It is well settled that a valid and final judgment may be successfully pleaded in bar against any subsequent action between the same parties dealing with the same right as to the same res. That the muniment of right in each case is different does not militate against the application of the rule, so long as the general type of right in the identical res is the same."

Respondents cannot logically acquire greater rights respecting the subject land than the owner. Since McDougal is prohibited from selling water for export from the premises, it must follow that Respondents may not purchase water from him for transport from the premises to Mexico.

McDougal's remedy was to make a direct attack of the State Supreme Court decision by appeal to this Court. He did so without success. Respondents may not properly relitigate the issue earlier adjudicated through collateral attack. (Moore's Federal Practice, §0.407, pages 931-932.)

B. The Anti-Injunction Act Prohibits the Federal Courts From Enjoining Enforcement of the Decision in the McDougal Case.

The "Anti-Injunction Act", 28 U.S.C. §2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Court of Appeals recognized "[t]he prohibition of [the Act] . . . is against a stay of 'proceedings in any court of a state'. That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process". (A-5, quoting *Hill v. Martin,* 296 U.S. 393, 403, 80 L.Ed. 293, 298, 56 S.Ct. 278, 281 (1935).)

The Court concluded, however, ". . . there does not remain a last act necessary to effectuate the California Supreme Court judgment in *County of Imperial v. McDougal.* McDougal has complied with the California Supreme Court ruling that he cannot challenge the no export prohibition and refuses to sell water to those who would export it out of the County". (A-5, 6.)

Said conclusions badly misapprehend facts and law.

Compliance with the judgment of the California Supreme Court requires that McDougal *not* sell water to Respondents for export. The preliminary injunction granted by the District Court enjoins enforcement to allow sales by McDougal in violation of the State Court judgment.

There *are* acts which the State Courts may take to effectuate the judgment in the *McDougal* case. The Superior Court's contempt order is illustrative of such enforcement powers. As hereinafter shown, the District Court's injunction is barred by the Anti-Injunction Act.

The Court of Appeals further stated "[m]oreover, even if ongoing state proceedings remain, [respondents] here, not being parties in the state suit, may mount a constitutional challenge in federal court against *the law* which is the subject of these state proceedings". (A-6, with emphasis added, citing *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 83 L.Ed. 771, 59 S.Ct. 526 (1938), for the proposition third parties are not prevented by the Anti-Injunction Act from challenging a statute on constitutional grounds where the statute is also under litigation in the state courts.)

In *Hale v. Bimco Trading, Inc.*, action was brought in the Florida Supreme Court to compel enforcement of a statute requiring inspection and fees for imported cement. (306 U.S. 375, 377.) Prior to entry of final judgment by the state court, Appellee Bimco Trading, Inc., a stranger to the state proceedings, commenced a separate action in the federal courts to enjoin enforcement of the statute. The Florida Supreme Court agreed to stay all further proceedings ". . . until the final decision of the Supreme Court of the United States . . ." (*Id.*) Thereafter, this Court affirmed the lower federal court's injunction against enforcement of the statute.

In stark contrast to the *Hale* case, the California Supreme Court in *McDougal* finally adjudicated the enforceability of the subject export restriction, and this Court dismissed McDougal's appeal, *before* any action was commenced in the District Court.

Moreover, *Hale* involved an action by a third party stranger to enjoin enforcement of a state statute. The present litigation does not involve any statute or ordinance of general application; instead, it deals with a special permit involving a single parcel of land. Further, Respondents are *not* strangers. They are contractors of McDougal; and, as noted, one of the Respondents actually participated as a declarant and as *amicus curiae* in the state court proceedings.

Application of the Anti-Injunction Act was recently discussed by this Court in *Vendo Co. v. Lektro-Vend Corporation,* 433 U.S. 623, 53 L.Ed.2d 1009, 97 S.Ct. 2881 (1977). In *Vendo,* after nine years of litigation in the Illinois courts, the Supreme Court of Illinois affirmed a money judgment in favor of Vendo Company. Shortly thereafter, Lektro-Vend Corporation petitioned the U.S. District Court to enjoin state proceedings to collect the judgment. The District Court granted that request and the Court of Appeals affirmed.

This Court reversed, finding that the injunction was barred by the Anti-Injunction Act. Specifically, the Court determined the Clayton Act did not authorize the federal injunction under the "expressly authorized" exception to §2283.

In the course of its opinion, the Court emphasized the inflexible nature of the Act stating that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy". (433 U.S. 630.) The Court also addressed the argument the injunction was necessary in aid of the District Court's jurisdiction and rejected said rationale, stating:

"[n]o case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception". (*Vendo Co. v. Lektro-Vend Corporation,* 433 U.S. 623, 630.)

In *Vendo,* this Court referred to the Anti-Injunction Act as an "absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act". (433 U.S. 630.) The Court stated flatly "[It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation". (433 U.S. 630 citing *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511, 514, 99 L.Ed. 600, 75 S.Ct. 452 (1944).)

Although Respondents in the present case sought to additionally enjoin the Superior Court, the District Court tailored its preliminary injunction toward the County and its officials. Anti-Injunction Act cases, however, have consistently held that a restraint against the parties rather than against the court itself does not make the action any less a violation of 28 U.S.C. §2283.

Beginning with *Union Central Life Ins. Co. v. Mc Aden, et al.,* 21 F.Supp. 110 (5th Cir. 1937), federal courts have criticized this technique. In *H. J. Heinz Co. v. Owens,* 189 F.2d 505 (9th Cir. 1951), the Court of Appeals denied a motion for an injunction stating: "[t]his statutory prohibition is not avoided by framing an injunction as a restraint on a party rather than directly against the state court itself". (Also see *Furnish v. Board of Medical Examiners,* 257 F.2d 520 (9th Cir. 1958).)

C. Direction by the Court of Appeals for the District Court to Rely on Hughes v. Oklahoma Is Erroneous.

The Court of Appeals directed that the District Court's decision ". . . regarding the merits of the Commerce Clause question" should be made in light of *Hughes v. Oklahoma,* ..... U.S. ....., 60 L.Ed. 2d 250, 99 S.Ct. 1727 (1979). (A-4.) Said direction is inapposite.

The appellant in *Hughes* was convicted of violating an Oklahoma statute which prohibited the export outside the state of minnows procured from state waters. He directly attacked the conviction by challenging the constitutionality of the statute before this Court. This Court assumed jurisdiction and determined the statute violative of the Commerce Clause. (*Hughes v. Oklahoma, supra.*)

Obviously, *Hughes* is distinguishable from the present case. The former involved no *res judicata* or Anti-Injunction Act questions.

In *Hughes,* the Appellant was successful in a direct attack on the state court judgment. McDougal's direct attack failed.

Hughes involved a challenge to a state-wide statute. The present case does *not* involve any statute or ordinance of general application prohibiting export of water. At issue is the enforceability of a special use permit restriction affecting a single parcel.

Since the California Supreme Court ruled the restriction in McDougal's use permit is enforceable, and this Court dismissed McDougal's appeal, there should be no "Commerce Clause question". Assuming *arguendo* Respondents do have standing, it is not clear that *Hughes v. Oklahoma* should control.

In *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 52 L.Ed. 828, 28 S.Ct. 529 (1908), this Court sustained a New Jersey statute preventing the exportation of water from its boundaries. There a resident of New Jersey contracted to provide water from New Jersey streams to New York City. Subsequently, the State of New Jersey, reciting the need for preserving the fresh water of the state for the health and prosperity of its citizens, enacted a statute requiring:

> ". . . it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein".

The effect of the New Jersey statute was to prevent the plaintiff from supplying water to New York pursuant to its contracts. Plaintiff sued to have the statute invalidated on grounds it was not reasonably related to its stated purposes and the legislature had transcended its authority by interfering with interstate commerce. (209 U.S. at 354.)

The lower court upheld the New Jersey statute on the basis the defendant enjoyed only the rights of a riparian owner and the statute was justified as prohibiting such a riparian from taking more water from the stream than its just share. This Court affirmed the validity of the New Jersey statute, and Chief Justice Oliver Wendell Holmes, who wrote the opinion, stated as follows:

> ". . . [I]t appears to us that few public interests are more obvious, indisputable, and independ-

ent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 356.

Conclusion.

The decision of the California Supreme Court in the *McDougal* case should be *res judicata* as to Respondents' action. Respondents' action is also barred by the Anti-Injunction Act. The injunction of the District Court, affirmed by the Court of Appeals, is in direct conflict with the final decision of the California Supreme Court. It is of critical importance that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

JAMES H. HARMON, *County Counsel,*
County of Imperial,
Attorney for Petitioners.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Guillermo Gallego Munoz; Humberto Martinez, Lic. Juan de Leon, Plaintiffs-Appellees, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon; Luis Legaspi; John Kennerson; James Bucher; Tunney Williams; Herman M. Sperber; J. Leonard Speer; Donald Courtney McDougal, Defendants-Appellants. No. 77-3293.

[July 26, 1979].

Appeal from the United States District Court for the Southern District of California.

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judge.

PER CURIAM:

Appellants County of Imperial (County) and its officials challenge in this appeal a preliminary injunction entered by the district court enjoining the County from enforcing a condition a use permit held by one Donald C. McDougal. The condition prohibits the sale of water from McDougal's land for use outside the County of Imperial. We affirm the preliminary injunction. To explain our holding, we include the pertinent historical facts leading up to the instant litigation.

McDougal, who is not a party in this appeal, owns certain real property in the County of Imperial in southern California. When he purchased the property,

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*Honorable Walter E. Hoffman, Senior United States District Judge, for the District of Virginia, sitting by designation.

he also received a conditional use permit that allowed the commercial sale of water under the County's zoning law. As a condition to this sale, the permit required that the water be sold only for use in Imperial County.

The previous owner made little use of the water sale rights, but McDougal increased the operation substantially. When the neighbors complained about the increased business activity, the County brought suit in the California Superior Court to enjoin McDougal's water sales. The County alleged that McDougal was violating the conditional use permit by selling water for export outside the county and by employing large tank trucks which made noise and created fumes and dust.

The county was successful in its action and McDougal was enjoined from conducting a trucking operation of the type he started after purchase of the property. On appeal, the California Supreme Court partially affirmed the lower court's holding. *County of Imperial v. McDougal,* 19 Cal.3d 505, 138 Cal.Rptr. 472, 564 P.2d 14 (1977). The court upheld the export restriction in the conditional use permit by finding that it could not be challenged by McDougal. According to the court:

> "[A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit (citations omitted). Thus, McDougal is estopped to assert that the prohibition . . . against the sale of water is invalid, and he is bound by the limitation." 564 P.2d at 18.

The court specifically added, in a footnote to this quote, that in view of this holding it did not need to reach the constitutional question as to whether the permit's prohibition on the export of water was valid. 564 P.2d at 18, n.3. Finally, the court reversed the trial court's determination that the export limitation also prohibited McDougal from conducting a large-scale water sale operation. The court found the limitation not to be a regulation of land use but rather a condition upon the sale of a commodity, specifically a prohibition against the sale of water outside the County. 564 P.2d at 19.

Following this ruling, McDougal reopened the well. Pursuant to the California Supreme Court ruling upholding the export restriction, McDougal has, since the reopening, required each purchaser of water to sign an affidavit that the water being bought will be used only in Imperial County.

Appellees Munoz, Martinez and deLeon are Mexican merchants who had contracts for purchasing water from McDougal and were exporting the water to Mexico. When they returned to purchase water after the reopening of the well, McDougal refused to sell it to them because of the terms of his conditional use permit. Appellees then filed the instant action in federal district court and applied for a preliminary injunction. The injunction sought to keep the County from enforcing the out-of-county sale restriction on the ground that it violated the Commerce Clause, Article I, § 8, cl. 3, of the United States Constitution. The court ruled in appellees' favor and enjoined the County from enforcing the no export term of the conditional use permit. The County appeals from this order.

The district court found the elements necessary for the granting of preliminary injunctive relief—irreparable injury, probable success on the merits,[1] balance of equities in plaintiff's favor, and presence of a public interest, *see Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers,* 584 F.2d 308, 314-15 (9th Cir. 1978); *Sierra Club v. Hathaway,* 579 F.2d 1162, 1167 (9th Cir. 1978)—to be present in this case. The County does not challenge these findings, but argues instead that the California state court proceedings preclude the district court from issuing an injunction.

The County claims that under the Anti-Injunction Act, 28 U.S.C. § 2283, the existence of the state proceedings removes the district court's power to issue the preliminary injunction. The Anti-Injunction Act provides:

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[1]The district court found the restriction on the sale of water outside Imperial County to be on its face a direct prohibition against interstate commerce in the water. Consequently, the court found it likely that appellees would succeed on the merits of their contention that the restriction in the use permit violates the Commerce Clause.

While we do not reach the merits of the Commerce Clause question, we note that subsequent to the issuance of the district court injunction, the United States Supreme Court decided *Hughes v. Oklahoma,* 99 S.Ct. 1727 (1979). In *Hughes v. Oklahoma,* the Court struck down an Oklahoma statute which prohibited the export outside of the State of minnows procured from state waters. The Court found that the statute "on its face discriminates against interstate commerce" and that "[s]uch facial discrimination by itself may be a fatal defect, regardless of the State's purpose . . . . At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." 99 S.Ct. at 1737.

The district court's decision regarding the merits of the Commerce Clause question should be made in light of *Hughes v. Oklahoma.*

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The district court found the Anti-Injunction Act not to be a bar because there was no pending state court proceeding which would be enjoined by the federal injunction. The County argues that there was still a pending proceeding in the enforcement of the California Supreme Court judgment. In *Hill v. Martin,* 296 U.S. 393 (1935), the United States Supreme Court stated:

> "The prohibition of § 265 [the precedessor to the present 28 U.S.C. § 2283] is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process . . . . It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." 296 U.S. at 403. (footnotes omitted).

Recently, in *Vendo v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), the Supreme Court applied this rule and overturned a lower federal court order which enjoined the collection of a state court money judgment.

In the instant case, however, there does not remain a last act necessary to effectuate the California Supreme Court judgment in *County of Imperial v. McDougal.* McDougal has complied with the California Supreme

Court ruling that he cannot challenge the no export prohibition and refuses to sell water to those who would export it out of the County. No further proceedings or enforcement provisions of the California Supreme Court decision remain which may be affected by the district court injunction. Moreover, even if ongoing state proceedings remain, appellees here, not being parties in the state suit, may mount a constitutional challenge in federal court against the law which is the subject of these state proceedings. In *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939), the Supreme Court held that third parties are not barred under the Anti-Injunction Act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state courts. Finally, the district court's injunction did not violate the rule that "the prohibition of § 2283 cannot be evaded by addressing the order to the parties" rather than to the state court. *Atlantic Coast Line R.R. v Bhd. of Locomotive Engineers,* 398 U.S. 281, 287 (1970). Appellees in their complaint sought to enjoin, in addition to the County and its officers, the California Superior Court from interfering with their right to purchase water from McDougal. The district court enjoined only the County and its officers and specifically added in its order that it "wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate commerce in the water." (emphasis in original). The purpose of excluding the California Superior Court from the injunction, however, is not to avoid impermissibly the effects of the Anti-Injunction Act. Instead the injunction excludes the California courts because those courts are not now faced with the issue of the constitutionality of the zoning ordinance. The injunction is

directed against the County, the only body claiming that the zoning ordinance and its conditional use permit are constitutional. In such circumstances, the district court's issuance of the injunction against the County is not an attempt to circumvent the effect of the Anti-Injunction Act. We find that the Anti-Injunction Act does not bar the instant federal injunction.

The County's additional argument, that the instant action is precluded by the *res judicata* effect of the state court proceedings, must also be rejected. Under the doctrine of *res judicata*, a final valid judgment rendered on the merits is binding on the parties or their privies so as to prevent them from relitigating the same case in either the same or a different forum. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978). "Before the doctrine may apply, there must be (1) a valid, final judgment, (2) rendered on the merits, (3) a subsequent action involving the same parties or those in privity with them, (4) that is based on the same cause of action or claim." *Hooker v. Klein*, 573 F.2d at 1367. The parties, focusing on the third element of this formula, have argued the question of whether appellees are in privity with McDougal so as to be bound by the California Supreme Court judgment against him. We need not reach this question, however, for we find that the other necessary elements of *res judicata* are missing here. A review of the California Supreme Court decision reveals that the issue of whether the County can constitutionally restrict the export of water was not reached by that court. *See County of Imperial v. McDougal*, 564 P.2d at 18, n.3. There is thus no valid final judgment on the merits existing as to the cause of action in

the instant case. As a result, the California Supreme Court decision would not have a *res judicata* effect in a case where proper parties, including even those in privity with McDougal, are directly challenging the permit's validity on constitutional grounds. Since the doctrine of *res judicata* extends only to issues that have been litigated on their merits, *see Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979); *Hooker v. Klein*, 573 F.2d at 1367, it is not applicable in this case.

The judgment of the district court is AFFIRMED.

APPENDIX B.

Order Granting Motion for Preliminary Injunction.

United States District Court, Southern District of California.

Guillermo Gallego Munoz, et al., Plaintiffs, v. County of Imperial; et al., Defendants. Civil No. 77-491-T.

The plaintiffs' motion for a preliminary injunction was heard on August 8, 1977. The plaintiffs appeared by Murry Luftig, Esq., and William Kronberger, Esq., Donald McDougal, Jr., Esq., appeared for defendant McDougal and James Harmon, Esq., appeared for the County of Imperial and for the other defendants. For the reasons and upon the conditions set forth below, the court grants the motion.

Facts

In 1967, one Simpson purchased a certain tract of land located in Imperial County and erected thereon a well. He applied for a use permit which would authorize the commercial sale of water from the well and the permit was granted with this condition: "[t]he water will be sold only for use within the Imperial County." Following the grant of the permit, Simpson sold water on a very small scale. Then in 1970 the land was zoned Open Space (S), requiring a conditional use permit for development of natural resources for commercial purposes.

In June, 1972, defendant McDougal bought the land from Simpson and soon the neighbors began to complain about increased operation of the well. In time the County filed suit against McDougal, seeking injunctive relief. Evidence was offered to the effect that McDougal had greatly expanded the scale of operation of the

well by selling water for use in Mexico; there was evidence of heavy traffic in large tank trucks at all hours of the day and night, and these trucks were accused of generating noise, fumes, dust and other unpleasantness.

The Superior Court of Imperial County enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972," based on its conclusion that McDougal's activities violated the 1970 zoning law.

The case was appealed and the California Supreme Court held that the restriction in the use permit prohibiting sale of water for use outside Imperial County could not be challenged by McDougal. *County of Imperial v. McDougal,* 19 Cal.3d 505 (1977), *reh. denied,* 19 Cal.3d 619b (1977). Following this ruling, McDougal reopened the well. In obedience to the injunction entered by the Superior Court, McDougal has, since the reopening, required each purchaser of water to sign an affidavit that the water being bought will be used only in Imperial County.

The plaintiffs, who had bought water from McDougal for transportation to Mexico during 1972, appeared at the well and offered to buy water. They refused to sign the affidavit and McDougal refused to sell them water. They now seek injunctive relief restraining the County and the Superior Court from interfering with their right to purchase water and requiring McDougal to sell water to them.

Jurisdiction

The defendants raise 28 U.S.C. §2283 (the "Anti-Injunction Act") as a bar to this proceeding. However, what is really being sought in this lawsuit is not to

enjoin a pending state court proceeding but rather to restrain the enforcement of an allegedly unconstitutional ordinance. It seems obvious that this court may, if otherwise appropriate, restrain the operation of an unconstitutional statute; surely it does not lose the right to do so merely because the statute has been tested in the state courts. In *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939), the Supreme Court held that a third party was not barred from challenging a statute merely because the same statute was also under litigation in the Florida courts. *Hale* is controlling here and this court concludes that section 2283 does not bar this lawsuit.

The defendants also argue that the proper method of attacking the California Supreme Court decision is by writ of certiorari to the United States Supreme Court, rather than by this lawsuit. However, the plaintiffs herein do not have the option of requesting such a writ. They are not parties to the state court action and can do nothing to appeal or otherwise influence the result. Hence the plaintiffs may proceed with the case in this court.

Res Judicata

The defendants vigorously argue that the state court proceedings in this case are *res judicata*. Under the doctrine of *res judicata*, a final valid judgment is binding on the parties so as to prevent them from re-litgating the same case in either the same or a different forum. The one issue presented by the doctrine of *res judicata* as applied in this case is identity of the parties; if the parties are identical to those involved in the state litigation, then *res judicata* will bar this lawsuit.

For purposes of the doctrine of *res judicata,* "identity of parties" actually means either the identical parties to the first lawsuit, or those in "privy" with them. The plaintiffs herein were not parties to the California lawsuit, but the defendants contend that these plaintiffs are in privy with McDougal and hence are bound by the decision of the California courts.

First, the defendants point out that the plaintiffs filed an *amicus* brief with the California Supreme Court favoring McDougal's presentation there. However, an appearance as *amicus* is insufficient to bind the one so appearing to the result of the case. 1B Moore's Federal Practice 2d ¶0.411[1], page 1253; *Brown-Crummer Investment Co. v. Paulter,* 70 F.2d 184 (10th Cir. 1934).

Second, the defendants urge that the extent of involvement between the plaintiffs and McDougal is sufficient to place them in privy with one another. The resolution of this contention requires a careful definition of what is at issue in this lawsuit.

Initially, we note "There is no generally prevailing definition of privity that can be automatically applied to all cases involving the doctrine of res judicata," 29 Cal.Jur.2d, Judgments §269, and "the determination of who are privies requires careful examination into the circumstances of each case as it arises," 50 C.J.S. Judgments §788. Neither party has cited, and the court has failed to find, any cases sufficiently close the facts of this case as to constitute controlling precedent. Accordingly, some general principles or privity and *res judicata* will now be examined.

An adjudication of property rights binds the parties to the judgment and their successors in interest. Accordingly, it is said that those successors are privies to

the judgment. 50 C.J.S. Judgments §788. Privity sometimes means "a mutual or successive relationship to the same rights of property, such an identification in interest of one person with another as to represent the same legal rights," 29 Cal.Jur.2d Judgments §269. "It has been declared that privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title," 46 Am.Jur.2d Judgments §532, and "privity relates to persons in their relation to property and not to any question independent of property, and to make one a privy to an action, so as to bar him by the adjudication, he must have acquired an interest in the subject matter of the action," 50 C.J.S. Judgments §788.

The common theme running through all of the above citations, as well as through the various court decisions dealing with the problem of privity, is a common interest in property, which property is the subject matter of litigation. But the plaintiffs herein have no common property interest with McDougal. At issue in the state proceeding was McDougal's use permit; the use permit is a part of the land and runs with the land, as the California Supreme Court expressly held. The plaintiffs have no property interest in McDougal's land or in his use permit. Their interest is in the steps taken by the County to enforce what they perceive as an unconstitutional ordinance. Therefore, since the property interest which was litigated in the state courts was exclusively McDougal's and not the plaintiffs,' it must follow that the plaintiffs were not in privity with McDougal and his state court judgment does not bar them from proceeding with this lawsuit.

The Elements of Injunctive Relief

The traditional elements of injunctive relief include the following, all of which a plaintiff must satisfy if he is to have the relief he seeks:

(a) Irreparable injury,

(b) Probable success on the merits,

(c) Balance of equities in the plaintiff's favor, and

(d) Granting the injunction is in the public interest.

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975).

In cases challenging the constitutionality of statutes or other legislative enactments, the first two elements predominate, *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98 (1948), although the court may not disregard the public interest, *Yakus v. United States*, 321 U.S. 414, 440 (1944). Accordingly, the elements of relief will each be examined in the context of the present controversy.

Irreparable Harm

A plaintiff who would be granted an injunction must first satisfy the court that without one he will suffer irreparable harm or, in other words, that his legal remedies are inadequate. *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500 (1959).

In this case, the parties are in agreement that the harm the plaintiffs will suffer (if they do not get an injunction) is economic harm. Further, their damages are capable of reasonably precise calculation: to be specific, those damages would be the extra costs involved in driving to a more distant well to obtain water. Normally, the fact that mere economic injury is threatened is, of itself, sufficient grounds to deny

equitable relief. However, in this case the court is presented with the extraordinary situation in which the plaintiffs have no adequate remedy at law for their damages because, although the plaintiffs can calculate their damages, there is no one from whom to collect those damages after they have been calculated.

Clearly, judicial immunity would shield the California courts at all levels from any liability. For his part, McDougal did no more than to obey an order of those courts on pain of going to jail, and it would be grossly unfair to hold him responsible in damages for obeying that order. The County of Imperial and its supervisors are the only defendants left, and they are protected from liability by California Government Code §818.4, as interpreted by such cases as *O'Hagan v. Board of Zoning Adjustment,* 38 Cal.App.3d 722 (1974). Thus, there is no one to compensate the plaintiffs, and it must follow that they have no remedy at law. Accordingly, the injury they would suffer in the absence of an injunction is irreparable.

Success on the Merits

The power to regulate interstate and foreign commerce is granted exclusively to Congress by the Constitution (Art. I, §8, clause 3). State or local laws that directly interfere with interstate commerce are void, but the state may exercise its police powers in ways that do not "unduly" burden interstate commerce. *Southern Pacific Co. v. State of Arizona.* 325 U.S. 761 (1945).

In *Commonwealth of Pennsylvania v. State of West Virginia,* 262 U.S. 553 (1923), the Court held that a natural gas-producing state could not, by statute, give gas customers within the state a preferred status

over out-of-state customers. And in *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 262 (1910), the Court invalidated a state law which had the "character and purpose" of denying the owners of natural gas the right to take it out of the state. The Court said: "no state can by action or inaction *prevent*, unreasonably burden, discriminate against *or directly regulate*, interstate commerce or the right to carry it on." (221 U.S. at 272; emphasis added)

These two cases controlled the result in *City of Altus, Oklahoma v. Carr*, 255 F.Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966). The City of Altus was challenging a Texas statute which forbade "drilling a well in Texas and transporting the water outside the State," 255 F.Supp. at 830. The court, relying on the natural gas cases, *supra*, found that the prohibition of the interstate shipment of water was unconstitutional.

In this case, the restriction in McDougal's use permit does not seek to regulate *land* use. It seeks solely to regulate *commodity* use—specifically, the transportation of water outside of the county. The California Supreme Court expressly found that "the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the county." *County of Imperial, supra*, at page 512. The restriction did not attempt to regulate land use, the conduct of a business, traffic in a residential area, or any other such activity. Instead, the restriction is on its face a direct prohibition against interstate commerce in the water. The Commerce Clause will not permit such a direct prohibition any more than it would permit the interference with commerce attempted

by the States of West Virginia, Oklahoma, or Texas in the cases cited above.

The cases cited by the defendants do not deal with the same sort of direct prohibition of commerce. One case, however, deserves further comment. In *Hudson County Water Co. v. McCarter,* 209 U.S. 349 (1908), the Court upheld a New Jersey statute which prohibited the transportation of certain water outside the state. River water was involved, and the critical factor there was the limited property right in that water possessed by the party desiring to export it. The record does not show any such limit on McDougal's property interest in the water from his well.

Accordingly, there is a probability that the plaintiffs will succeed on the merits of their contention that the restriction in the use permit is unconstitutional.

The Equities and the Public Interest

In *Yakus, supra,* certain wartime price regulations were under attack. Those regulations and the statute which authorized them provided a means of review, but the plaintiff there chose not to use the means provided. The Court found a compelling public interest in the subject matter of the statute as a whole and in preserving the scheme established for review of the regulations. Such factors are not present in this case, however.

There are no means by which these plaintiffs, in contrast to the plaintiff in *Yakus,* can challenge the restriction in the use permit other than the instant proceeding. The only other possible method of attack would be a political proceeding before the appropriate lawmaking entities of Imperial County, a method which the court in the *Altus* case found to be inadequate.

Further, there is no compelling public interest which will be frustrated if the plaintiffs are granted their injunction. There is no comprehensive use plan or water conservation plan the implementation of which will be blocked by an injunction here. All that is involved is one specific piece of real estate and one specific phrase in one specific use permit. Thus, the compelling public interest which existed in *Yakus* is entirely absent here, and the public impact of an injunction will be minimal.

The court recognizes that commercial use of McDougal's well may be an irritant to others in the neighborhood. However, assessing the nature and intensity of such irritation and balancing it against the injury the plaintiffs are suffering, the court finds that the balance tips towards the plaintiffs.

Conclusion

For the reasons discussed above, the court concludes that the plaintiffs are entitled to a preliminary injunction restraining the supervisors and their agents from enforcing the restriction in the use permit which prohibits sale of water for use outside Imperial County.

The court wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate commerce in the water. As the California Supreme Court noted, there is no reason why the county cannot, if it so desires, employ suitable means of land use control so as to prevent a public nuisance. There are many legitimate regulations which the police power would permit the county to impose; examples include limitations on operating hours of the well, limitations on noise in residential areas, restriction of trucks to designated truck routes, etc. The California

Supreme Court noted that on remand the Superior Court could reach just such issues (19 Cal. 3d at page 513), and nothing in the instant opinion is to be construed to the contrary.

DATED: August 29, 1977.

/s/ Howard B. Turrentine

Howard B. Turrentine, United States District Judge

Preliminary Injunction.

United States District Court, Southern District of California.

Guillermo Gallego Munoz, et al., Plaintiffs, v. County of Imperial et al., Defendants. Civil No. 77-491-T.

This matter was heard on August 8, 1977. For the reasons and upon the conditions set forth in the order granting the plaintiffs' motion for a preliminary injunction entered this date,

IT IS ORDERED that the County of Imperial and its supervisors, and their agents and employees, are enjoined from enforcing that condition in defendant McDougal's use permit which prohibits the sale of water for use outside the County of Imperial.

IT IS FURTHER ORDERED that this preliminary injunction is granted on condition that an undertaking in the sum of $1000.00 be filed to make good such damages, not to exceed said sum, as may be suffered or sustained by any party who is found to be wrongfully enjoined.

IT IS FURTHER ORDERED that this preliminary injunction may be served by any person over the age of eighteen years selected for that purpose by the plaintiff.

DATED: August 29, 1977.

/s/ Howard B. Turrentine
Howard B. Turrentine, United
States District Judge

APPENDIX C.

Opinion.

In the Supreme Court of the State of California.

County of Imperial, Plaintiff and Respondent, v. Donald C. McDougal, Defendant and Appellant. L.A. 30681, (Superior Ct. No. 43353).

[May 25, 1977].

In 1967, Imperial County (county) issued to W. Erle Simpson a use permit to allow commercial sales of water from a well on Simpson's property, which was located in a residential subdivision. The permit contained a limitation that water could be sold for use only within the county. Simpson did not challenge the condition, and he sold only small quantities of water from the well for local use. In 1970, the tract in which Simpson's property was located was zoned for low intensity use, but the zoning allowed the development of natural resources for commercial purposes upon the issuance of a conditional use permit.

Simpson sold the property to defendant Donald C. McDougal in 1972. McDougal, without obtaining a new permit pursuant to the 1970 enactment, proceeded to substantially increase the volume of sales of water from the well, and numerous trucks entered the property for the purpose of transporting the water. He failed to comply with the limitation in the Simpson permit against the sale of water for use outside the county, and much of the water from the well was sold for distribution in Mexico.

The county sought injunctive and declaratory relief, alleging that McDougal was violating the 1970 zoning law by selling water for export and by employing tank trucks to carry large amounts of water from the well, without a conditional use permit. The trial

court found in the county's favor and enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972."[1]

On this appeal from the ensuing judgment, McDougal claims that he is not required to secure a permit pursuant to the 1970 zoning ordinance because under the permit issued to Simpson he has a vested right to increase the volume of sales from the well and to employ tank trucks for hauling the water away, and that the limitation in the permit against sales of water for use outside the county is invalid.

The subdivision in which Simpson's land was located consisted of 16 10-acre parcels which were governed by deed restrictions providing that the lots were to be used for residential purposes. Although the tract had not been comprehensively zoned in 1967 when Simpson applied for his permit, an interim zoning ordinance required a permit for any land uses other than those specifically exempted therein, and county officials notified Simpson that he was required to obtain a permit in order to conduct a commercial water sale business.

Public hearings were held on Simpson's application, initially before the planning commission, and subse-

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[1]A second cause of action alleged that the manner in which McDougal operated his business constituted a public nuisance, and a third asserted that McDougal was violating the county's Groundwater Appropriations Ordinance. The third cause of action was by stipulation of the parties ordered to be separated from the first and second, and to be tried only upon good cause being shown on motion of either party. No trial of this count was held. The trial court made no findings on the second cause of action alleging a nuisance, determining that such findings were unnecessary because of its conclusion that McDougal was violating the county's zoning laws.

quently before a joint meeting of the commission and the board of supervisors. At the commission meeting, two other landowners in the tract argued against the granting of the permit on the ground that it would interfere with the quiet enjoyment of their property, and the county's chief planning officer recommended against granting the permit for the same reason.

Between 1968 and 1972, only a few tank trucks were loaded with water from the well, and Simpson sold a total of approximately 500,000 gallons of water in those years. When McDougal purchased the property in 1972, he was aware of the restriction against the sale of water for export from the county and knew that Simpson had not made intensive commercial use of the well. McDougal requested the board of supervisors to remove the export limitation, but he was advised that a conditional use permit would be required to accomplish this result. Without applying for such a permit, he entered into contracts to sell water for distribution in Mexico, and beginning in July 1972 as many as 44 trucks a day, with a capacity of 250,000 gallons, loaded water at the well day and night.

The neighboring landowners protested the noise and fumes generated by the traffic, and county officials, contending that McDougal was required to secure a conditional use permit under the 1970 ordinance, demanded that he discontinue his operation. Thereafter, McDougal applied for a permit, but with insistence that his application was without prejudice to any subsequent claim that no permit was required. The permit was denied, and he unsuccessfully appealed the denial to the board of supervisors.

In October 1972, the county brought this action to restrain McDougal from selling water from the well or from allowing tank trucks to enter his property for the purpose of carrying water away, and it also sought a declaration that McDougal was violating the 1970 zoning ordinance.

The trial court found that McDougal's business "as conducted on the premises commencing on or about June 30, 1972" was in violation of the zoning ordinance because he had failed to secure a conditional use permit. It found further that the Simpson permit did not entitle McDougal "to conduct his type of operation" and that the restriction contained in that permit was designed to prevent the intensive commercial operation undertaken by McDougal because it would be incompatible with the surrounding residential land uses. Finally, the court determined that McDougal's business constituted an illegal "formidable expansion" of the usage contemplated under the Simpson permit, and that any effect on international commerce due to the restriction was merely incidental to a valid exercise of the police power designed to regulate local land use.

The court's judgment declaring that McDougal was in violation of the 1970 ordinance and enjoining him from "conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972" appears to relate both to the sale of water for export outside the county and to the use of substantial numbers of trucks to carry the water from the property. We conclude that the judgment must be upheld in its first aspect but that there was insufficient evidence to justify the prohibition against the manner in which the business was operated.

McDougal's fundamental assertion is that he was not required to obtain the conditional use permit required by the 1970 zoning ordinance because he had a vested right, pursuant to the Simpson permit, to sell water from the well, and that he was not compelled to comply with the geographic restriction in the permit because it is invalid.

Initially, we observe that a conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations but because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit is required.[2] (3 Anderson, American Law of Zoning (2d ed. 1977) p. 359.) Such permits run with the land (Cohn v. County Board of Supervisors (1955) 135 Cal.App.2d 180, 184), and McDougal succeeded to any benefits which Simpson enjoyed under the permit issued to him. Thus, if Simpson would have been allowed to carry on his business in the manner McDougal employed after June 1972, then McDougal was operating within the permit and was not required to secure a permit under the 1970 ordinance.

It is equally clear, however, that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed. Simpson, by failing to challenge the limitations imposed upon him by the permit, waived his right to object to the condition prohibiting the

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[2]Section 83421 of the county's ordinances authorized the issuance of a conditional use permit if "such uses as deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the comprehensive general plan."

sale of water for use outside the county. At the joint meeting between the planning commission and the board of supervisors during which issuance of the permit was discussed, he was represented by counsel, and at that hearing voluntarily withdrew from his application a request to export water to Mexico. The deputy county counsel had stated as his opinion that the proposed limitation on the export of water was valid. Thereafter, Simpson accepted the benefits afforded by the permit and conducted himself in accordance therewith.

A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. (Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 650; Zweifel Manufacturing Corp. v. City of Peoria (Ill. 1957) 144 N.E.2d 593, 595; Psyhogios v. Village of Skokie (Ill. App. 1972) 280 N.E.2d 552, 556; Skipjack Cove Marina, Inc. v. County Commissioners (Md. 1969) 250 A.2d 260, 265-267; Stevenson v. Palmer (Tenn. 1969) 448 S.W.2d 67, 69; cf. Naper Aero Club v. County of Du Page (Ill. 1964) 197 N.E.2d 1.) Thus, McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the county is invalid, and he is bound by the limitation.[3]

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[3]In view of this conclusion, we need not decide whether the prohibition against the export of water was valid. (See City of Altus, Oklahoma v. Carr (W.D.Tex. 1966) 255 F.Supp. 828.) Shelley v. Kraemer (1947) 334 U.S. 1, relied upon by McDougal, is inapposite. In that case, it was held that the enforcement by a state court of a racially restrictive

We come, then, to the second aspect of the trial court's determination, i.e., that the conditional use permit issued to Simpson did not authorize McDougal to conduct his water sale business as an intensive commercial operation, with numerous trucks entering and leaving the premises night and day. As we have seen, the permit contained no express limitation in this regard. The trial court's determination was based upon its conclusion that the purpose of the restriction against the sale of water for export was to prevent intensive commercial exploitation of the well on Simpson's property in a manner incompatible with the surrounding residential area. McDougal claims that the evidence was insufficient to support this determination, and we agree.

The record establishes that in July 1967 two neighbors opposed Simpson's application for a permit before the planning commission on the ground that commercial use of the property would violate their right of quiet enjoyment, and the county's chief planning officer recommended against granting the permit for the same reason. He testified that the commission was concerned both about the export of water and "intensification of usage of the land" in considering Simpson's application, but did not refer to any specific evidence in this regard. The planning commission determined to hold the matter over for a joint meeting with the board of supervisors in order to allow time for the

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covenant in a real estate contract constituted state action, denying the black purchasers equal protection of the laws. *Shelley* did not involve the waiver of rights or the challenge to the validity of a condition relating to the economic value of a permit whose benefits the permittee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional rights which the petitioners in *Shelley* sought to vindicate.

two bodies to formulate a water exportation policy for the county. That hearing was held in September, and members of both bodies expressed concern over the amount of water being exported from the county to Mexico. After Simpson agreed to remove his request to sell water for use in Mexico, the planning commission reconvened and voted to grant the Simpson permit on the condition that water from the well would be sold only for use within the county. No mention was made at the joint meeting of matters relating to the use of Simpson's land, and in the resolution of the planning commission granting the permit reference was made to problems of water export but none to limiting the character of the commercial usage of Simpson's property.[4]

The evidence relied upon by the county is insufficient to sustain the trial court's finding that the restriction was designed to prevent intensive commercial use of Simpson's property. If the commercial character of the proposed use had been a major concern of the commission it was not without means to control Simpson's business by the imposition of appropriate restrictions. Instead, the commission, after extensive discussion of the water exportation problem, issued the permit conditioned only upon a limitation on the export of water, in a resolution which referred only to that issue. Under

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[4]McDougal asserts that the trial court erred in finding that there was public opposition to the granting of the Simpson permit because the resolution of the planning commission granting the permit states otherwise. The resolution, dated September 11, 1967, refers to the joint meeting between the board of supervisors and the planning commission and states that "there was no opposition present at *this* meeting." (Emphasis supplied.) Obviously, the resolution refers to the September meeting rather than the July hearing before the planning commission alone. It is clear from the testimony there was opposition to the granting of Simpson's permit at the July hearing.

these circumstances, we must conclude that the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the county.

Thus, the trial court's judgment must be affirmed insofar as it prohibits McDougal from violating the restriction against the exportation of water from the county, and reversed to the extent that it determines that McDougal violated the 1970 zoning ordinance by allowing large numbers of trucks to haul water from the well and enjoins him from operating his business in this manner.

Our decision does not mean, of course, that the county may not employ means to assure that McDougal does not conduct his business by methods which crease a nuisance. As we have seen, the second cause of action in the county's complaint alleged a nuisance, but the trial court found it unnecessary to make findings on this issue because it determined that McDougal's conduct violated the zoning ordinance. Upon remand, the trial court may consider appropriate findings on the county's allegations that McDougal's operation of his business constitutes a nuisance.

One final matter should be noted. The county contended at the trial that McDougal was prohibited from selling water from his well by section 83400 of the county's ordinances, which provides that nonconforming uses of land must be discontinued within one year. The trial court found that "[A]ny nonconforming use right" of McDougal was terminated by this provision. We have concluded that McDougal had a valid conditional use permit for commercial operation of the well, and the operation of his business did not constitute a nonconforming use.

The trial court's judgment is affirmed insofar as it prohibits McDougal from selling water for use outside the county; it is reversed to the extent that it enjoins McDougal from employing large numbers of tank trucks to haul water from his property and determines that such conduct violates the county's 1970 zoning ordinance.

Mosk, *J.*

We concur:

Tobriner, *Acting C. J.*

Clark, *J.*

Richardson, *J.*

*Sullivan, *J.*

**Devine, *J.*

**Brown (Geo. A.), *J.*

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

**Assigned by the Chairman of the Judicial Council.

Order Denying Petition for Rehearing.

In the Supreme Court of the State of California.

County of Imperial, Plaintiff and Respondent, v. Donald C. McDougal, Defendant and Appellant. L.A. 30681, (Super. Ct. No. 43353).

[July 7, 1977]

BY THE COURT

On petition for rehearing, McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the Court of Appeal or in this court. (Employers' L.A. Corp. v. Indus. Acc. Com. (1918) 177 Cal. 767, 771; Prince v. Hill (1915) 170 Cal. 192, 195; People ex rel. Dept. of Public Works v. Mascotti (1962) 206 Cal. App.2d 772, 779; Bradley v. Bradley (1949) 94 Cal. App.2d 310, 312.)

The petition for rehearing is denied.

APPENDIX D.

Contempt Judgment.

In the Superior Court of the State of California, in and for the County of Imperial.

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant. No. 43353.

Filed, March 6, 1979.

Defendant Donald C. McDougal was, on May 1, 1978, ordered to show cause why he should not be adjudged guilty of contempt for disobeying the Judgment of this Court, entered on July 11, 1973, at Book 127, Page 936 of the Records of the Court, insofar as said judgment prohibits McDougal from selling water from the well on his premises at the Yuha Estates for use outside the County. Hearings on said matter were continued from time to time and concluded on February 28, 1979 at the Courthouse in El Centro, on which date the Defendant was present and represented by Donald C. McDougal, Jr., and David Kay, and, the County was represented by James H. Harmon, County Counsel.

Based on stipulations of Defendant McDougal's Counsel, and on written and oral evidence duly admitted at various hearings, the Court has determined that Defendant McDougal has continued, since September, 1977, to knowingly sell water from the aforesaid premises to persons and/or businesses, who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico. The Court having, on the 28th of February, 1979, announced its intended decision to adjudge McDougal in contempt and, further findings having been waived,

and the stay of execution provided for herein having been agreed to by the parties,

IT IS ORDERED, DECLARED AND DECREED as follows:

1. McDougal is knowingly selling water from the well on the above premises to persons and/or businesses who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico. Such sale by McDougal constitutes willful disobedience of the Judgment of this Court, as affirmed by the California Supreme Court at 19 C 3d 505 (1977). Defendant McDougal is therefore adjudged guilty of contempt of Court, under Section 1209(5) of the Code of Civil Procedure.

2. McDougal shall cease the selling of water as above described. Execution of this order is, however, stayed until the United States Court of Appeal for the Ninth Circuit renders a decision in the case of *Guillermo Gallego Munoz, et al. v. County of Imperial, et al.* (Appeal No. 77-3293) or until such other time as ordered by this Court, whichever date is sooner.

Dated: March 5, 1979.

/s/ Andrew J. Eyman
Andrew J. Eyman
Judge of the Superior Court

Order Clarifying Stay of Execution Provisions in Contempt Judgment.

In the Superior Court of the State of California, in and for the County of Imperial.

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant. No. 43353.

Filed: March 22, 1979.

GOOD CAUSE APPEARING THEREFORE, the Court hereby modifies and clarifies the stay provisions of its Contempt Judgment, entered in the above captioned case on March 6, 1979, Book 140, page 375, as follows:

Paragraph 2 of page 2, lines 21 through 28, is hereby amended to read:

"2. Defendant McDougal shall cease the selling of water as above described. (Repeated from the aforesaid judgment, page 2.) This order is stayed pending a decision by the United States Court of Appeals for the Ninth Circuit in the case of *Guillermo Gallego Munoz, et al. v. County of Imperial, et al.* (Appeal No. 77-3293), as hereinafter provided. Should the County prevail in said appeal, the effective date of the above referenced cessation order shall be thirty (30) days from the entry of the decision by the Court of Appeal. Should the said Court of Appeals rule adversely to the County's position, and should the County appeal, the stay will continue until final determination of said appeal.

The Court reserves jurisdiction to otherwise modify the stay provisions herein, and/or to impose sanctions, on motion of either party.

The date of entry of the above referenced Contempt Judgment shall be deemed the date of entry of this order clarifying the stay of execution provisions thereof."

IT IS SO ORDERED.

DATED this 21st day of March, 1979.

/s/ Andrew J. Eyman
Andrew J. Eyman
Judge of the Superior Court